SUPREME COURT OF THE UNITED STATES
October Term, 1976

No. 76 - _____

CIVIL SERVICE COMMISSION OF THE CITY OF NEW YORK, THOMAS ROCHE, Personnel Director, Department of Personnel, MICHAEL J. CODD, Police Commissioner, City of New York, and HARRISON J. GOLDIN, Comptroller, City of New York,

Petitioners

v.

76-784

ANNICK M. BERNS,

Respondent.

PETITION FOR A WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

ANNICK M. BERNS,

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PETITION FOR A WRIT OF CERIORARI TO THE UNITED STATES COURT OF APPEAL FOR THE SECOND CIRCUIT

Introductory Statement

This is a petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit for review of a judgment filed June 29, 1976, which reversed so much of an order of the United States District Court for the Southern District of New York as permanently enjoined the New York City Civil Service Commission from terminating the employment of the respondent, Annick M. Berns, as an administrative aide with the New York City Police Department for failure to meet eligibility requirements, and remanded this matter to the district court for proceedings consistent with the Court of Appeals' opinion. The Court of Appeals affirmed the district court's finding that respondent had been deprived of due process in that she was not accorded a pre-termination hearing. In its initial opinion the Court of Appeals had not indicated what sort of hearing, other than that it should be pre-termination,

should be accorded the respondent. By order filed September 10, 1976, the Court of Appeals denied the motion of the defendants (here petitioners) for re-argument but amended its opinion to indicate that respondent was not entitled to a "trial type" hearing, but only to an opportunity for her or her counsel to present oral argument or facts relevant to the issue of whether or not she was eligible for appointment to the civil service position to which she had been appointed.

Citations Below

The opinion of the Court of Appeals, as amended, is officially reported at 537 F. 2d 714; the opinion of the district court is not officially reported. Both are appended hereto.

Jurisdictional Statement

The order of the Court of Appeals denying the petitioners' timely motion for reargument was filed September 10, 1976. Certiorari jurisdiction is conferred on this Court by 28 U.S.C. §1254(1).

Questions Presented

1. Did the Court of Appeals err in holding that respondent had a state law protected interest in her employment such that as a matter of federal due process she was entitled to a pre-termination hearing?

2. Did the Court of Appeals err in holding that respondent was entitled to a pre-termination oral hearing to determine her eligibility for appointment where (1) under state law she was accorded no

such absolute right; (2) she had never in this proceeding requested this type of hearing (but instead had insisted that she could only be fired after a hearing on charges relating to her performance of her duties); and (3) the basic facts relating to respondent's educational accomplishments, i.e., schools attended, period of attendance and courses taken, were not disputed, and all that was in issue was whether on these undisputed facts respondent should be deemed to have the equivalent of a high school education?

Statement of the Case

In December 1973 respondent applied to take a civil service examination for the position of police administrative aide. Applicants were informed that to be eligible to take this examination they must have a

high school diploma or its equivalent. Respondent stated on her application that she had graduated from high school. No claim was made below that this answer was knowingly false.

Respondent passed the examination and was appointed on April 30, 1973. In accepting her appointment she executed an instrument acknowledging that she accepted this appointment subject to subsequent investigation as to her eligibility for appointment. Subsequent to completion of her probationary term respondent was notified that her employment would be terminated for failure to meet the educational requirements. At that time she was informed that she could appeal this determination to the City's Civil Service Commission in writing but that no oral appeal would be allowed. She submitted such an appeal, but it was

disallowed. She thereafter filed this suit pursuant to 42 U.S.C. §1983, seeking to enjoin her termination (she has been retained in her position pending the outcome of this litigation).

In the courts below respondent argued that, as a tenured civil servant, she could be removed only for cause, such as misconduct or incompetence, after a hearing (citing New York Civil Service Law §75). Neither court below accepted this proposition, but the district court did take it upon itself to de novo review respondent's educational attainments, and concluded that respondent was in fact eligible for appointment and permanently enjoined her termination on this ground.

The Court of Appeals held that the district court acted incorrectly in itself passing on the issue of respondent's

educational attainments and in enjoining her termination, but that respondent did have a state law property interest in her employment sufficient to bring into play the due process guarantee of the Fourteenth Amendment, based upon her completion of her probationary period. It held that respondent was entitled to a pre-termination hearing at which she or her counsel could orally present facts and argument to support her claim of eligibility. The Court's amendment to its opinion states that this is not to be a "trial-type" hearing, and the opinion, both originally and as amended, makes it clear that respondent's claim that she could only be removed for cause, following a hearing on specific charges of incompetence or misconduct, was rejected.

In answer, to the petitioners' reliance upon New York Civil Service Law §50(4), which, inter alia, authorizes the State's or a municipal civil service commission to revoke an employee's certification and appointment and direct that his employment be terminated where subsequent investigation reveals either lack of qualification for appointment or illegality, irregularity or fraud of a substantial nature, the Court, in effect, held that as a matter of state law the New York Courts would not have allowed a summary termination of respondent's employment, but rather would have held her entitled to a pre-termination hearing. In support of this view, the Court cited Canarelli v. New York State Dept. of Civil Service, 353 N.Y.S. 2d 275 (4th Dept. 1974), an Appellate Division decision which holds that even under §50(4) a hearing may be required under certain

circumstances, and a lower court decision very narrowly construing §50(4).

In her complaint, and before the courts below, respondent had not requested a hearing of the type to which the Court of Appeals here held her entitled, and petitioners in their brief filed on the appeal to that Court did not address the issue of when under §50(4) a hearing might be required. However, on the motion for reargument, petitioners pointed out that, while under certain circumstances the New York courts would hold a hearing required even where the termination was pursuant to §50(4) (see Canarelli v. New York State Dept. of Civil Service, supra; McShane v. City Civil Service Comm'n of the City of New York, 378 N.Y.S. 2d 706 [1st Dept., 1976]), the clear import of the New York decisions was that this was not ordinarily required. On that motion, petitioners also

pointed out that respondent had already been afforded the opportunity for a written appeal, upon which she had been allowed to submit documentation in support of her claim of eligibility, and that on the basically undisputed facts here a further hearing did not appear called for. As indicated, this motion was denied, but the Court did amend its opinion to make it clear that a "trial-type" hearing was not required.

Reasons for Granting the Writ

(1)

Under one view, the instant petition presents what might be considered only a question of local law, of little or no national significance. On another level, however, this case presents important questions of the role of the federal courts in relation to the states and in

affording relief never sought. In addition, the decision of the Court of Appeals herein, at least in part purporting to be based on New York law, seems squarely to conflict with New York law, has thrown into confusion the administration of the New York City Department of Personnel, and, if not reversed, will necessitate the adoption of cumbersome and expensive hearing procedures even where, as here, there is no dispute as to the basic facts. For these reasons, we would urge that a writ of certiorari here be granted.

(2)

At the outset, we would note that, while in this case there was a "controversy" between the parties, that controversy had nothing at all to do with whether as a matter of federal due process or state law under New York Civil Service Law §50(4) determination

of respondent's eligibility had to be preceded by any particular type of hearing. Respondent had in fact been accorded a type of "hearing", to wit, an appeal on papers, with the opportunity to submit documentation, and no further administrative hearing on this issue was requested by her. Instead, insofar as a hearing was concerned, respondent, simply ignoring §50(4), urged in the courts below that as a tenured civil servant respondent could only be removed following a trial-type hearing on charges of misconduct or incompetence. The idea that respondent might be entitled to some other type of administrative hearing on the issue of her eligibility for appointment was raised solely by the Court of Appeals, for the first time in its opinion, and without any opportunity for the parties to brief this question before the Court had

already committed itself to such a broad view as to the requirement of a further hearing. This was, we believe, fundamentally unfair and inconsistent with our adversary system of justice. On this ground alone we believe the writ of certiorari should be granted and, either summarily or after argument, the judgment of the Court of Appeals reversed and the proceeding remanded with instructions to dismiss the complaint.

(3)

On the merits of the Court of Appeals' holding that, in effect, all dismissals of otherwise tenured employees pursuant to Civil Service Law §50(4) must be preceded by a hearing allowing for an oral presentation, we would submit that neither state law nor the federal due process guarantee in any way support such a holding.

Indeed, both this Court (see, e.g., Matthews v. Eldridge, 424 U.S. 319, 334-335 [1976]), and the New York Courts (see, e.g., Canarelli v. New York State Dept. of Civil Service, supra; McShane v. City Civil Service Comm'n of the City of New York, supra; cf. Matter of Balash v. New York City Employees' Retirement System, 34 NY 2d 654; 311 N.E. 2d 649 [1974]) have taken a flexible, realistic approach to the question of when a hearing is required and what sort of hearing is required. Here, where respondent was fully apprised of the reason for which she had been found disqualified for appointment and had been afforded an opportunity to file a written appeal, with documentation, we are at a loss to know how the "truth finding process" (Matthews v. Eldridge, supra, 424 U.S., at 344) would be substantially advanced by an oral presentation. And,

certainly, insofar as federal due process is concerned, where this Court has indicated that it is the "generality of cases" which must be considered, "not the rare exceptions" (id.), and that the courts should also consider the administrative burden and expense of extending hearing requirements (id. at 335, and 347-348), it seems clear that the Court of Appeals' sweeping decision in this case has radically, and without support, extended the concept of procedural due process.

If this case were one of the "rare exceptions" where either a trial-type hearing or an opportunity for oral presentation held out some realistic hope for advancing the truth finding process, we are confident that the New York courts, simply as a matter of state "due process", would order an appropriate hearings -

although not necessarily pre-termination. However, this is not such a case, and neither state law nor, we believe, federal due process here requires such a hearing. Moreover, we would submit, with state law clearly making civil servants, even when they otherwise enjoy tenure protection, summarily terminable under §50(4), there is not even properly presented in this case a question of federal due process. Rather, this statute appears quite clearly to deprive such employees of any state law protected property interest in their positions when under the statute a determination has been made that their employment should be terminated. And, accordingly, it would seem to follow, it should here be held that there is implicated no question of a deprivation of procedural due process. Cf. Bishop

v. Wood, _____U.S._____ 96 S. Ct. 2074 (1976).

(4)

Assuming, arguendo, that this case does present an issue of federal due process, we submit that there is presented here no basis for imposition of a requirement of the type of hearing which the Court of Appeals has ordered. Provision of such hearings will be costly and time consuming, and goes beyond anything contemplated by state law. In addition, determination of whether a terminated employee will be held entitled to such a hearing will likely depend upon the forum chosen for contesting his discharge. And, indeed, one New York appellate court has already indicated its disagreement with the view taken by the Court of Appeals in this case of New York law under under §50(4). See Matter of Reisman v. Codd, _____AD 2d_____ (1st Dept.,

November 25, 1976), New York Law Journal, Nov. 26, 1976, p. 6, col. 1, where the Appellate Division, First Department, rejected a claim that an otherwise tenured employee could not be terminated pursuant to §50(4) without a hearing. There the Court, speaking most politely, stated with respect to the decision of the Court of Appeals here, "We are not at all clear that that Court was correct in its interpretation of New York State law as holding that an employee retained beyond her probationary period achieves such a status [a property interest in the job] despite the provisions of Civil Service Law section 50(4)."

We accept that a dispute such as this between the Court of Appeals and the New York courts may not argue in quite the same way for grant of the writ of

certiorari as does a dispute between the circuits, but we submit a dispute such is this is more unseemly and subversive of confidence in the law, as in one and the same state, New York, the two court systems, state and federal, are applying quite different law, and the result in any particular case presenting this issue, of which the numbers are increasing, depends entirely upon the forum chosen.

Conclusion

For all of the above reasons, we submit that a writ of certiorari should here be granted.

December 7, 1976

Respectfully submitted,

W. BERNARD RICHLAND
Corporation Counsel
Attorney for Petitioners.

L. KEVIN SHERIDAN,
of Counsel.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Docket No. 75-6121

ANNICK M. BERNS,

Plaintiff-Appellee,

-against-

CIVIL SERVICE COMMISSION, CITY OF NEW YORK, ALPHONSE E. D'AMBROSE, Personnel Director, Department of Personnel, MICHAEL J. CODD, as Police Commissioner, City of New York, and HARRISION J. GOLDIN, as Comptroller, City of New York,

Defendants-Appellants.

On Appeal From an Order of the United States District Court for the Southern District of New York

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Samuel Resnicoff, New York City plaintiff-appellee.

L. Kevin Sheridan, New York City (W. Bernard Richland, Corp. Counsel of the City of New York, and Reuben David, New York City, on the brief), for defendants-appellants.

Before LUMBARD, WATERMAN and MESKILL, Circuit Judges.

LUMBARD, Circuit Judge:

The Civil Service Commission of the City of New York (CSC) has brought this appeal from a judgment of the Southern District, entered on October 21, 1975, that declared illegal the termination of Annick M. Berns as a police administrative aide and permanently enjoined the CSC from terminating Berns for failure to meet educational requirements. We find that although the procedure through which Berns was terminated violated her due process rights under the Fourteenth Amendment, the district court exceeded its jurisdiction in fashioning a remedy. We therefore affirm the finding of a due process violation but reverse the grant of a permanent injunction.

The facts are undisputed. In December 1972 Annick Berns, plaintiff below, applied to take a civil service examination for the position of police administrative aide in New York City. Applicants were notified that the position required that they have a high school diploma or its equivalent. Plaintiff stated on her application that she had graduated from high school and it is not alleged that this answer was made in bad faith.

Berns achieved a sufficiently high score on the examination to be placed on a list of eligibles, and on April 30, 1973 she was appointed to the position of police administrative aide for a probationary period of six months. Following the satisfactory completion of this trial

period on October 29, 1973, Berns was retained in her position and thereby became a "permanent" employee. N.Y.C.R.R. Civil Service §4.5(a)(3). Rating reports indicated that Berns's performance ranged from satisfactory to superior and the CSC has not contended that appellee is anything but an ideal employee. In March 1974, Berns took and passed the New York State High School Equivalency Diploma Examination.

On November 6, 1974, however, Berns was notified that her employment would be terminated for failure to meet educational requirements in that her French academic career did not constitute the equivalent of a high school diploma.

Berns was born in France and attended school there until 1959. She last received a diploma from a French school in 1957 when

she was 14 years of age. To obtain this diploma, Berns successfully completed courses in algebra, chemistry, mathematics, history, and foreign languages. She continued her academic career in France and received a Certificate of Completion from Ecole d'Hotesses de Paris, which apparently offered courses relevant to scholarly studies and the social graces.

Berns was subsequently informed that no oral appeal of the decision to terminate her employment would be allowed, although a written appeal would be considered. Berns submitted a letter to support her position that her education was sufficient to satisfy the CSC's requirements, but, on February 26, 1975, her appeal was denied. Berns then instituted this action in the district court to have her termination invalidated and for damages. At the request of the

police department, she has been retained in her position pending the outcome of this litigation.

Judge Tenney found that upon expiration of her six-month probationary period, Berns became a tenured employee and could not be dismissed without a prior hearing. He further held that while the French and American educational systems were not functional equivalents, plaintiff's education was sufficient to entitle her truthfully to answer on her application to take the civil service examination that she held the equivalent of a high school diploma. Judge Tenney thus granted summary judgment for Berns and permanently enjoined the CSC from removing her from employment for failure to meet educational requirements. This appeal followed.

We agree with Judge Tenney that the summary dismissal without a prior hearing violated Berns's right to due process of law under the Fourteenth Amendment. In making this determination, a federal court must look to state law to determine whether the employee has satisfied the requirements for attaining a property interest in the job that will be protected by the due process clause. See Bishop v. Wood, ___ U.S. ___, 96 S. Ct. 2074, 48 L. Ed. 2d 684, 44 U.S.L.W. 4820 (1976). Cf. Demorest v. City Bank Farmers Trust Co., 321 U.S. 36, 64 S. Ct. 384, 88 L. Ed. 526 (1944). Under New York law, Berns achieved this status when she was retained beyond her six month probationary period. See McCarthy v. Board of Education of Union Free School District No. 3, 73 Misc 2d 225, 340 N.Y.S. 2d 679, 685 (Sup. Ct.,

1973); N.Y. Civil Service Law § 75; N.Y.C. R.R. Civil Service § 4.5(a)(3). By remaining a police administrative aide after October 39, 1973, Berns acquired an enforceable expectation of continued public employment," Bishop v. Wood, supra, and her employment could not thereafter be terminated in the absence of procedural safeguards, including at a minimum, a predismissal hearing of the charges made against her. See Board of Regents v. Roth, 408 U.S. 564, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972); Perry v. Sindermann, 408 U.S. 593, 92 S. Ct. 2694, 33 L. Ed. 2d 570 (1972); Vega v. Civil Service Commn., 385 F. Supp. 1376 (S.D.N.Y. 1974), vacated as moot, Docket No. 75-7007 (2d Cir. 1975).

This requirement of a predismissal hearing is not altered by the provisions of New York Civil Service Law §50(4) which

permit the CSC to investigate the qualifications of en employee after appointment and to revoke the appointment upon finding facts which if previously known would have disqualified the apppointee. Appellant argues that Berns was never properly accorded permanent employee status because, had it known the facts of her educational background when it received her application, she would not have been certified to take the December 1972 examination. Therefore, the CSC contends, revocation of that certificate subsequent to the examination makes her appointment void ab initio. We disagree.

Even if §50(4) is interpreted as providing a procedure for summary dismissal rather than just grounds for dismissal in accordance with procedural safeguards,

the state courts have refused to invoke the statute to deny a pretermination hearing to an employee otherwise entitled to one. In Canarelli v. New York State Dep't of Civil Service, 44 A.D. 2d 645, 353 N.Y.S. 2d 275 (4th Dept. 1974), post-appointment investigation of a permanent employee revealed doubt as to whether he had satisfied an educational prerequisite to his appointed position. There was no allegation of fraud and no contention that the appointee had not performed his work in a commendable manner during his 1 1/2 years of employment. The court held that, given these circumstances, the State Department of Civil Service could not summarily dismiss the employee under § 50(4), but was required to grant him a hearing at which evidence of his satisfaction of the educational requirement could requirement could be adduced.

In Kelliher v. New York State Civil Service Comm'n, 21 Misc. 2d 1034, 194 N.Y.S. 2d 89 (Sup. Ct. Special Term 1959), the court held that where "there is no question of fraud or bad faith," the power to dismiss conferred by § 50(4) could be exercised only where the irregularity leading to the certification of the employee relates to a matter "bearing substantially upon the basic qualifications of the individual or upon the purposes and effectiveness of the civil service system." 194 N.Y.S. 2d at 95. In light of appellee's meritorious performance of her duties since her appointment, no claim has been alleged here by CSC that she is basically unqualified or that her employment is detrimental to the service. Thus we conclude that the state courts would not deny Berns a pretermination hearing on the basis of Civil

Service Law § 50(4) and that that provision does not constitute a bar to her expectation of continued employment.

Since state law provides that the mere passage of time accords to Berns an enforceable property interest in her job and, in these circumstances, the CSC could not have deprived her of a hearing by declaring her appointment void ab initio, her dismissal without a hearing must be vacated as a violation of her right to due process. Once that right has been vindicated, however, the federal interest in this litigation ceases. Judge Teeney apparently thought that a determination of whether Berns's educational background provided the equivalent to a high school diploma was essential to the question of whether she was entitled to any due process rights. He therefore addressed the issue and decided it

in appellee's favor. However, as we have concluded that in this situation appellee's status as a permanent employee conferred a right to a pre-termination hearing upon her, we find no need or jurisdictional basis for the federal court to determine whether Berns possessed the equivalent of a high school diploma. That question is exclusively one of the state law to be addressed by the CSC in the first instance and by the state courts.* A federal court

*New York procedure allows appeal of any CSC action to be taken to the state courts, which have demonstrated solicitude for the rights of civil servants. See Leonardo v. Civil Service Comm., 34 N.Y. 2d 760, 358 N.Y.S. 2d 136, 314 N.E. 2d 876 (1974); Giangiacomo v. Village of Liberty, 50 A.D. 2d 666 375 N.Y.S. 2d 223 (3d Dept. 1975); Canarelli v. New York State Dept. of Civil Service, 44 A.D. 2d 645, 353 N.Y.S. 2d 275 (4th Dept. 1974); Kelliher v. New York State Civil Service Commn., 21 Misc. 2d 1034, 194 N.Y.S. 2d 89 (Sup. Ct. Special Term 1959).

is not qualified to determine the significance that New York will lend to Berns's educational background and, as the question is unrelated to enforcement of her due process rights, no independent federal ground exists for us to usurp the state's function in this matter. As this court "is not the appropriate forum in which to review the multitude of personnel decisions that are made daily by public agencies," Bishop v. Wood, supra, ___ U.S. at ___, 96 S. Ct. at 2080, 44 U.S.L.W. at 4822-23, we must decline to instruct state agencies as to what constitutes compliance with their own regulations.

We therefore reverse that part of Judge Tenney's decision that permanently enjoins the CSC from relitigating the adequacy of Berns's educational background

and from dismissing her for failure to meet educational requirements. We require only that any attempt to dismiss appellee be preceded by a hearing at which she or her counsel may present arguments and facts in support of her alleged satisfaction of eligibility regulations. We do not require a full trial-type hearing.

The cause is remanded to the district court for proceedings consistent with this opinion.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------x
ANNICK M. BERNS,

Plaintiff,

-against-

CIVIL SERVICE COMMISSION, CITY OF NEW YORK; ALPHONSE E. D'AMBROSE, Personnel Director, Department of Personnel; MICHAEL J. CODD, as Police Commissioner, City of New York, and HARRISON J. GOLDIN, as Comptroller, City of New York, #43268

Defendants.
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TENNEY, J.

This matter is brought before the Court on cross-motions for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. For the reasons stated below, the plaintiff's motion is granted and the defendants' motion is denied.

This is an action for declaratory and injunctive relief. Plaintiff Annick H. Berns ("Berns") alleges a deprivation of

her fourteenth amendment rights to procedural due process and equal protection. The action is brought pursuant to 28 U.S.C. § 1331; 28 U.S.C. §§ 1343(3) & (4); 28 U.S.C. §§ 1361 and 1391; 28 U.S.C. §§ 2201 and 2202; 42 U.S.C. §§ 1981 and 1983, and Rule 57 of the Federal Rules of Civil Procedure. A recitation of the facts is essential to a proper understanding of the matters at issue.

Plaintiff was born in France and attended school there. She attended Ecole Maternelle, the equivalent of our kindergarten, and then matriculated at Ecola-Privee De Filles, a parochial school in Paris, in 1949. In 1957, she received the Certificat d'Etudes Primaires at Ecole-Privee De Fillee. Her courses at that institution included, inter alia, Algebra, Chemistry, two foreign languages (English

and Spanish), Literature, Mathematics, World History, French History, and Natural Sciences (which included Botany, Music and Art). After her graduation she continued her studies at that school until 1959, taking additional academic courses. Plaintiff also attended and received a Certificate of Completion from Ecole-D'Hotesses Events, Current Affairs, Politics, and Poise.

Late in 1962 plaintiff emigrated to the United States, and is now a resident of the State of New York and a citizen of the United States.

During December of 1972, the Civil Service Commission posted a Notice of Examination for Civil Service Examination No. 2251. The Notice of Examination called for applications to be submitted from December 1, 1972 to December 29, 1972.

Plaintiff made application to take the exam and applied for the position of Police Administrative Aide which was offered through the exam.

The minimum requirements for applicants, as set forth in the Notice of Examination, are as follows:

> "MINIMUM REQUIREMENTS: High school graduation or evidence of having passed an examination for a high school equivalency diploma or U.S. Armed Forces GED certificate with a score of at least 35 on each of the five tests and an overall score of at least 225 in the examination for the diploma or certificate; and either two years of paid full-time clerical experience, or two years of active military duty, or one year of college or university, or an equivalent combination of experience and education. However, high school graduation or its equivalent as described above is required of all candidates.
>
> . . .
>
> "The minimum requirements must be met by the last date for the receipt of applications.

> "All candidates who file applications will be summoned for the written test prior to the determination of whether they meet the minimum requirements. The experience papers of passing candidates only will be evaluated.
>
> "Form A experience paper must be filed with the application." See Defendants' Exhibit "1" appended to the Answer.

In answer to the question in the application inquiring about the applicant's educational background, plaintiff stated that she had graduated from high school.

Plaintiff scored 86.3% on the examination (the passing score was 70%) and was placed on the list of eligibles. On April 30, 1973, plaintiff was appointed to the position of Police Administrative Aide. Plaintiff remained in a probationary status for six months and at the satisfactory completion of her probation, on October 29, 1973, she was retained in her position.

At the suggestion of the Civil Service Commission and the Police Department, plaintiff took the New York State High School Equivalency Diploma Examination on March 26, 1974, and passed with a score of 276 (the passing score was 225). She was subsequently awarded a New York State Education Department High School Equivalency Diploma, 1974 Series.

Thereafter, on November 6, 1974, plaintiff was notified that she was found not to be qualified for her position by reason of her failure to meet the educational requirement. Plaintiff was not given a hearing prior to notification, but was advised of her right to file a written appeal with the Civil Service Commission. This she did on November 12, 1974, but the appeal was subsequently denied on February 29, 1975. No hearing

rights attached at the appeal. Plaintiff has been retained in her position pending the outcome of the instant litigation.

Plaintiff contends that she truthfully answered all questions regarding her educational qualifications and that she was justified in answering as she did since her education in France was the functional equivalent of a high school education here. She points out that while the educational systems of the two countries are different, the course work which she completed in France was roughly the same as a high school curriculum in this country. Plaintiff has cited the diploma which she earned at Ecole Privee De Filles in support of her contention and in addition cites: (1) the advanced course work completed at that institution, (2) the course

work completed at Ecole D'Hotesses De Paris, (3) the grade of 86.3% which she received on the Civil Service Examination, (4) the grade of 276 which she received on the HIgh School Equivalency Examination, and (5) the rating sheets indicating her consistently superior performance evaluations while employed as a Police Administrative Aide.

Plaintiff alleges that the defendants had full and accurate knowledge of her educational background before them; that she successfully completed her probationary period and became a tenured civil service employee; that she performed her assigned duties as a tenured employee in an exemplary fashion; and that the attempt to terminate her without a hearing prior to termination worked a deprivation of her constitutional rights in light of her tenured status. Also, she contends that

the failure of defendants to promptly evaluate her application (the investigation was not instituted until March 11, 1974, and she was notified of her proposed termination on November 6, 1974, more than one year after she had allegedly acquired tenured status) works substantially to her prejudice and that defendants should be estopped at this late data from effecting the proposed termination. Plaintiff seeks a declaration that the proposed termination is unlawful, a preliminary and permanent injunction preventing defendants from effecting the proposed termination, and an award of damages.

Defendants point out that the Notice of Examination clearly stated that all applicants must have met the educational requirements prior to the last date for the submission of applications on December

29, 1972. They allege that when plaintiff, in her application, stated that she did meet the requirements, she misrepresented the true state of the facts.

Defendants state that, due to the large number of applicants and the time consumed in processing the applications, it is impractical to investigate the qualifications of all applicants prior to appointment. Thus, appointments are made conditionally, subject to verification of the applicant's qualifications and the applicant signs a statement consenting to this procedure which is formalized in the New York State Civil Service Law § 50(4). That section states in pertinent part:

> "4. Disqualification of applicants or eligibles. The state civil service department and municipal commissions may refuse to examine an applicant, or after examination to certify an eligible.

"(a) who is found to lack any of the established requirements for admission to the examination or for appointment to the position for which he applies....

....

"No person shall be disqualified pursuant to this subdivision unless he has been given a written statement of the reasons therefor and afforded an opportunity to make an explanation and to submit facts in opposition to such disqualification.

"Notwithstanding the provisions of this subdivision or any other law, the state civil service department or appropriate municipal commission may investigate the qualifications and background of an eligible after he has been appointed from the list, and upon finding facts which if known prior to appointment, would have warranted his disqualification, or upon a finding of illegality, irregularity or fraud of a substantial nature in his application, examination or appointment, may revoke such eligible's certification and appointment and direct that his employment be terminated, provided, however, that no such certification shall be revoked or appointment terminated more than three years after it is made, except in the case of fraud."

Plaintiff signed a statement consenting to the application of this statutory procedure.

Defendants contend that, had they been possessed of the requisite facts, they would not have made the appointment and that, since the notice of termination was sent within the three year period, the termination was valid and had the effect of terminating the appointment ab initio. It follows, they contend, that plaintiff never became tenured and never became entitled to the rights which accrue to a tenured employee such as the right to notice and a hearing prior to termination.

Defendants conclude that since plaintiff has failed to document to their satisfaction her compliance with the educational requirement prior to December 29, 1972, they have no choice but to terminate her. Assuming that the termination is

lawful, they request the Court to grant summary judgment in their favor dismissing the complaint.

Rule 56(c) of the Federal Rules of Civil Procedure provides in pertinent part that summary judgment "shall be rendered forthwith if the pleadings ... together with the affidavits ... show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." See generally Empire Electronics Co. v. United States, 311 F. 2d 175 (2d Cir. 1962). The burden is on the moving party to demonstrate both the absence of any genuine issue of material fact and, also, that movant is entitled to judgment as a matter of law. Dean Construction Co. v. Simonetta Concrete Const. Corp. 37 F.R.D. 242 (S.D.N.Y. 1965).

The parties agree, and the Court finds, that the following facts are not in dispute. Plaintiff was born in France and did the bulk of her educational work there. She attended Ecole Maternelle and then matriculated at Ecole-Privee De Filles in 1949. She received the Certificat d'Etudes Primaires from that institution in 1957 and continued her studies there. Her course work included courses in Chemistry, Algebra, English, Spanish, Literature, Mathematics, World History, French History, and Natural Sciences. She also attended, and received a Certificate of Completion from the Ecole-D'Hotesses De Paris, a type of finishing school where her courses included Psychology, Current Events, Current Affairs, Politics, and Poise. Then, in 1962, plaintiff emigrated to the United States.

From the date of her arrival here in 1962 until the date of the Civil Serivice Exam in 1972, plaintiff held a variety of secretarial jobs and attended the New York Institute of Finance and the Krea Institute. She took the Civil Service Exam in question, passed comfortably, and was appointed from the list of eligibles. On her application for the exam she stated that she possessed a high school education. Plaintiff was appointed to the position of Police Administrative Aide on April 30, 1973, successfully completed her probationary period on October 29, 1973, and, until she was notified that she was marked not qualified on November 6, 1974, she fulfilled all duties and obligations attaching to her position in a manner which earned her consistently superior ratings. Also, during this period of time she took, and handily passed, the

New York State High School Equivalency Diploma Examination and was awarded a diploma.

Defendants' contention is that plaintiff is not, in fact, a high school graduate. Plaintiff, of course, contends that she has attained that status. The Court clearly recognizes that "[o]n summary judgment the inferences to be drawn from the underlying facts ... must be viewed in the light most favorable to the party opposing the motion." United States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Nevertheless, while the proper determination of plaintiff's educational status is certainly a material factual determination, the Court must conclude that defendants have not raised a genuine issue as to this material fact. The only possible inference which can be drawn from

the facts outlined above is that, while the French and American educational systems are not functional equivalents for the purpose of facilitating a ready comparison, the plaintiff was certainly possessed of a degree of education which entitled her to answer the question regarding her education as she did. Her high achievement on all competitive examinations and her accomplished performance of her police duties butresses and makes this inference inescapable.

Both plaintiff and defendants agree that plaintiff's termination was carried out in summary fashion and without the benefit of a hearing. The summary dismissal of a tenured public employee has been held to be a violation of the fourteenth amendment's guarantees of procedural due process. Board of Regents v. Roth, 408 U.S. 564 (1972); Perry v. Sindermann, 408 U.S. 593 (1972):

Vega v. Civil Service Commission, City of New York, 385 F. Supp. 1376 (S.D.N.Y. 1974).

Plaintiff has carried the burden of proving the absence of any genuine issue of material fact and that she is entitled to a judgment as a matter of alw.

> "Having satisfactorily completed [her] probationary period and achieved permanent tenured status, plaintiff's 'property interest' in [her] job was entitled to the full panoply of procedural safeguards afforded by the Fourteenth Amendment. Board of Regents v. Roth, supra, Perry v. Sindermann, supra." Vega v. Civil Service Commission, City of New York, supra. 385 F. Supp. at 1382.

The Court is compelled to make two observations at this point. Initially, it should be noted that while the Civil Service Commission was in possession of plaintiff's application on or before December 29, 1972, they did not begin the background investigation until March 11, 1974, some fifteen

months later (and six months after plaintiff had achieved tenure). The investigation, once begun, resulted in the proposed termination on November 6, 1974, a span of less than eight months. While the Court need not dispose of plaintiff's estoppel argument, it is impelled to point out that this type of delay in instituting the investigation seems unwarranted. Once begun, the investigation was concluded fairly expeditiously despite the fact that verification of many entries had to be sought from sources in France. A prompt initiation of the inquiry herein may well have obviated the question at issue.

Secondly, due to the unusual nature of the problem presented in this case, this opinion is to be read narrowly and not to be extrapolated beyon the precise factual situation presented herein.